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No. 99-77

IN THE
Supreme Court of the United States

Exzavious Lee Gibson,

Petitioner,

v.

Tony G. Turpin, Warden,
Georgia Diagnostic and Classification Center,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

MOTION OF THE AMERICAN BAR ASSOCIATION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully moves for leave to file the accompanying brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner has consented to the filing of this brief. Respondent has refused consent.

INTEREST OF THE AMERICAN BAR ASSOCIATION

The ABA is a voluntary national membership organization of the legal profession. In several different ways, the ABA has taken a very active role in capital punishment issues. Although it has not taken a position on the constitutionality of the death

penalty in cases not involving juveniles or the mentally retarded, the ABA has made the right to effective assistance of counsel in *all* capital cases and the preservation of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); ABA *Standards for Criminal Justice* (2d ed. 1980).

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures. In 1989, an ABA task force conducted a nationwide study of death penalty *habeas* practice and procedures. Based upon the task force's report and recommendations, the ABA adopted in 1990, by overwhelming vote, a comprehensive policy statement urging legislative reform of *habeas* procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, to "amplify previously adopted Association positions on effective assistance of counsel in capital cases." These Guidelines were intended to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *Resolution of the ABA House of Delegates* 122 (1989).

On February 3, 1997, the ABA House of Delegates adopted a resolution calling for each jurisdiction that imposes

the death penalty to impose a moratorium on executions until the jurisdiction implemented policies and procedures -- including, *inter alia,* adherence to the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* -- to ensure that the death penalty is administered fairly and impartially and to minimize the risk that innocent persons may be executed. *See Resolution of the ABA House of Delegates* 107 (1997).

The issue in this case is whether it was constitutional for the State of Georgia to provide *no* counsel to an indigent, death row inmate for his first state *habeas* proceeding, where he sought to raise claims that could not have been raised on direct appeal. That issue is of particular and immediate concern to the ABA. The ABA is directly involved in efforts to secure competent counsel for death row inmates in post-conviction proceedings. In 1983, several Sections of the ABA jointly requested and received programmatic approval for an ABA "post-conviction death penalty representation project" designed to help provide volunteer legal representation for indigent death row inmates. The goals of the resulting ABA Death Penalty Representation Project are to better inform the bar and the public about the lack of representation available to death row inmates, to address this urgent need by recruiting competent volunteer attorneys, and to offer training and assistance to those attorneys. The Project is the only organization working on a nationwide basis to help secure post-conviction counsel for indigent death row inmates. The ABA thus is in a unique position to provide information to the Court concerning the lack of availability of counsel to assist death row inmates in connection with the critical claims at issue in this case: initial state *habeas* claims that could not have been brought on direct appeal.

CONCLUSION

For these reasons, the ABA respectfully urges the Court to grant this motion for leave to file the accompanying brief as *amicus curiae* in support of the position of the Petitioner.

Respectfully submitted,

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September 8, 1999

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BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession.[1] Its more that 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields.[2]

Although the ABA has not taken a position on the constitutionality of the death penalty in cases not involving juveniles or the mentally retarded, the ABA has made the right to effective assistance of counsel in *all* capital cases and the preservation of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); ABA *Standards for Criminal Justice* (2d ed. 1980).

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[1]Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief.

[2]Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

The issue in this case is whether it was constitutional for the State of Georgia to provide *no* counsel to an indigent, death row inmate for his first state *habeas* proceeding, where he sought to raise claims that could not have been raised on direct appeal. That issue is of particular and immediate concern to the ABA. As described further below, the ABA is directly involved in efforts to secure competent counsel for death row inmates in post-conviction proceedings. In 1983, several Sections of the ABA jointly requested and received programmatic approval for an ABA "post-conviction death penalty representation project" designed to help provide volunteer legal representation for indigent death row inmates. The goals of the resulting ABA Death Penalty Representation Project are to better inform the bar and the public about the lack of representation available to death row inmates, to address this urgent need by recruiting competent volunteer attorneys, and to offer training and assistance to those attorneys. The Project is the only organization working on a nationwide basis to help secure post-conviction counsel for indigent death row inmates. The ABA thus is in a unique position to provide information to the Court concerning the lack of availability of counsel to assist death row inmates in connection with the critical claims at issue in this case: initial state *habeas* claims that could not have been brought on direct appeal.

SUMMARY OF ARGUMENT

On September 12, 1996, a death row inmate named Exzavious Gibson stood alone in a Georgia courtroom.[3] The occasion was a state *habeas corpus* hearing that represented his first opportunity to present evidence in support of several constitutional claims. One of the most significant of those

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[3]The ABA adopts the statement of proceedings in the petition for certiorari.

claims was a Sixth Amendment claim of ineffective assistance of trial counsel that Gibson could not have brought on direct appeal. Because no volunteer lawyer had been found to assist him, Gibson's claims were presented in a form petition having nothing to do with the facts of his case. Because a lawyer still had not been found by the time of the hearing, and because the state judge would not grant a continuance to allow the Georgia Resource Center additional time to assume the representation, Gibson was forced to act as his own lawyer at the hearing. He presented no evidence. He asked no questions of the only witness. He made no objections and offered no argument. After the hearing, the judge adopted the State's proposed findings verbatim and dismissed the petition. For all practical purposes, Gibson's post-conviction claims have never been heard.

This case presents a narrow but critical question: whether an indigent death row inmate has a constitutional right to counsel to pursue initial state *habeas* claims, particularly where, as here, those claims could not have been raised on direct appeal. Exzavious Gibson could not secure a lawyer to pursue such claims: he could not afford to hire one, the State did not provide one, and he was unable to find volunteer counsel. The question in this case thus was not answered in either *Murray v. Giarratano*, 492 U.S. 1 (1989), or *Coleman v. Thompson*, 501 U.S. 722 (1991). Writing separately (and casting the deciding vote) in *Giarratano*, Justice Kennedy emphasized that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death," and that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). The facts in *Giarratano*, however, revealed that

"no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings." *Id.* (Kennedy, J., concurring in the judgment). Similarly, in *Coleman*, where the Court reserved the precise question presented by this case, the death row inmate had been able to secure counsel for his initial state *habeas* proceeding. *Coleman*, 501 U.S. at 755.

It is the experience of the ABA that petitioner is not alone in his inability as a death row inmate to secure counsel to pursue inital state *habeas* claims. As a result of Congress' recent withdrawal of federal funding from the death penalty "resource centers," and its enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, there is a critical shortage of counsel for death row inmates once direct appeal has concluded. Many States have failed to establish an appointment mechanism to provide qualified lawyers, and it is increasingly difficult to find volunteer lawyers. There are now numerous persons on death row who do not have a lawyer to help them file their initial state *habeas* petitions. The consequences are enormous. One of the most significant claims generally raised for the first time on *habeas* -- ineffective assistance of trial counsel -- cannot be evaluated *without* a lawyer. *See Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986). And *habeas* claims have been successful in a staggering percentage of death penalty cases. *See Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting).

There is a substantial constitutional foundation, arising from both the equal protection and due process jurisprudence of this Court, for recognition of a right to counsel for death row inmates to pursue initial state *habeas* claims. Nowhere is that right more compelling than where, as here, the claims could not have been raised on direct appeal and the indigent death row inmate has never had a lawyer to pursue them. Each of the

Court's decisions concerning the rights of indigent parties to counsel reflects an assessment both of the importance of the underlying interest at stake and the extent to which counsel is necessary to protect the rights of the indigent party. *See, e.g., Douglas v. California*, 372 U.S. 353, 356-58 (1963); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27-28 (1981); *Gagnon v. Scarpelli*, 411 U.S. 778, 785-87 (1973). Employing that framework here, recognition of a right to counsel in the circumstances presented by this case is compelling: there are few interests more substantial than the fair administration of the death penalty, and few instances in which the assistance of a lawyer is more indispensable than the pursuit of initial state *habeas* claims, including ineffective assistance of counsel, that could not have been raised on direct appeal. The ABA therefore urges the Court to grant the petition.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER AN INDIGENT DEATH ROW INMATE HAS A CONSTITUTIONAL RIGHT TO COUNSEL IN INITIAL STATE *HABEAS* PROCEEDINGS.

The ABA urges the Court to grant the petition because this case presents a constitutional question of critical importance to the fair administration of our nation's capital punishment system.

I. Certain Constitutional Claims Can Be Raised Only in State Post-Conviction Proceedings, and Many Death Row Inmates Currently Have No Lawyer to Assist Them with Such Claims.

A. For certain claims, state collateral review is the equivalent of direct appeal.

Because he was represented by his trial counsel on direct appeal, Exzavious Gibson was barred from raising his Sixth Amendment ineffective assistance of counsel claim until state collateral review. *See Berry v. State*, 422 S.E.2d 861, 863 (Ga. 1992). Such procedural bars are common. *See, e.g.*, Okla. Stat. tit. 22, § 1089(D)(4)(b) (1-2). Indeed, as a practical matter, it is virtually always the case that ineffective assistance of counsel claims cannot be raised until collateral review. As this Court has recognized, "[i]n general, no . . . meaningful opportunity exists for the full and fair litigation of a *habeas* petitioner's ineffective-assistance claims at trial and on direct review," *Kimmelman*, 477 U.S. at 378 n.3, and "collateral review will frequently be the only means through which an accused can effectuate the right to counsel." *Id.* at 378. As explained in *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc), ineffective assistance of counsel claims brought on direct appeal "are presumptively dismissible" because "[a] factual record must be developed." *Id.* at 1240.

Other important constitutional claims also typically require investigation outside the trial record and cannot be brought on direct appeal. Indeed, "some irregularities, such as prosecutorial misconduct, may not surface until well after the direct review is complete." *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting). In Georgia, a defendant does not have a right to review prosecution and law enforcement files, where evidence of a failure to disclose exculpatory evidence is most

likely to be found, until direct review is complete. *See* Ga. Code Ann. § 50-18-72(4); *see also Brady v. Maryland*, 373 U.S. 83, 90-91 (1963) (requiring the state to disclose exculpatory evidence); *Amadeo v. Zant*, 486 U.S. 214, 216-17 (1988) (upholding finding that claim of prosecutorial misconduct was not reasonably discoverable prior to collateral review). Similarly, claims of jury misconduct or tampering often cannot be discovered until after trial. *See, e.g., State v. Freeman*, 605 So. 2d 1258 (Ala. Crim. App. 1992) (juror misconduct found on collateral review, based on post-trial investigation).

Thus, for certain constitutional claims, collateral review is the equivalent of direct appeal; it is the first time a reviewing court may consider a particular constitutional challenge to the conviction and sentence. Moreover, the claims that typically fall into this category are among the most significant in maintaining the integrity of the judicial process in cases where the ultimate punishment of death is sought. These claims, when found to have merit, necessarily implicate the integrity of the trial outcome. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999) (requiring, for *Brady* claim, a "reasonable probability that the result of the trial would have been different if the suppressed [material had been] disclosed to the defense"). These claims thus are not concerned with mere technicalities or procedural niceties; rather, they relate directly to the reliability of the underlying verdict and death sentence.

And experience has proved that these claims are meritorious in an alarming number of capital cases. As Justice Stevens noted in *Giarratano*, a 1988 study found that the success rate in federal *habeas* proceedings in capital cases

ranged from 60% to 70% during the first decade following the reinstatement of the death penalty in 1976. 492 U.S. at 24 (Stevens, J., dissenting); *see also McFarland v. Scott*, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Of the capital cases reviewed in federal *habeas* corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error."). There can be no serious dispute that first-time state *habeas* claims in capital cases are critically important. In an increasing number of cases, however, there are no lawyers available to help death row inmates investigate, prepare, or prosecute their claims.

B. Many death row inmates currently do not have counsel for the preparation and prosecution of initial state *habeas* claims.

Exzavious Gibson is not alone in his inability as an indigent death row inmate to find a lawyer to assist him in the preparation and prosecution of initial state *habeas* claims. Many States provide little or no legal assistance to individuals on death row following trial and direct appeal. And, although volunteer counsel often have been found, there is an increasing number of inmates on death row who do not have, and never have had, a lawyer to represent them in connection with initial state *habeas* claims.

The ABA is in a unique position through its Death Penalty Representation Project to assess the availability of counsel for persons on death row following their direct appeal. In early 1998, the Project renewed its efforts to recruit volunteer counsel and made that goal its highest priority. Since that time it has enlisted more than 40 law firms to serve as volunteer counsel in post-conviction capital cases. In addition, the Project now funds five "resource counsel" at non-profit capital representation offices in four states and will shortly fund a

"resource counsel" in a fifth state. Unfortunately, these efforts, and those of other non-profit organizations working in particular States, do not begin to meet the enormous need for counsel. This is particularly true as a result of recent legislative changes that have reduced resources for capital representation projects and have made it increasingly difficult for volunteer counsel to handle a capital case.

Between 1988 and 1995, Congress provided federal funding for 20 capital post-conviction resource centers. That appropriation substantially increased the number of trained lawyers providing direct representation to death row inmates in collateral review proceedings, and was particularly effective in supporting the efforts of volunteer and court-appointed counsel. In 1996, however, Congress eliminated all federal funding for the resource centers, *see* Pub. L. No. 104-91, 110 Stat. 7 (1996), and most closed their doors by mid-year. To the extent these offices exist today, the overwhelming majority operate with a skeleton staff and little or no financial assistance from the States.

The situation became even more urgent with the passage in April 1996 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Among other things, the AEDPA provides a one-year statute of limitations for the filing of federal *habeas* actions. 28 U.S.C. § 2244(d)(1). For many inmates presently on death row, the clock now is ticking under the AEDPA and no post-conviction petition has yet been filed. Although a state court *habeas* filing tolls the AEDPA statute of limitations, many States have enacted filing deadlines even more rigorous than the AEDPA. *See, e.g.*, Ill. Comp. Stat. 725 § 5/122-1 (post-conviction petition generally must be filed within 45 days of filing of defendant's direct appeal brief); Ariz. Rev. Stat. § 13-4234(D) (post-conviction petition must be filed only 60 days

after disposition of direct appeal); Tex. Code Crim. P. Ann. art. 11.071 § 4(a); Va. Code Ann. § 8.01-654.1.

The AEDPA also tightens the relationship between state and federal *habeas*, and makes the assistance of counsel in state *habeas* critical to the entire post-conviction review process. The AEDPA provides that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). This presumption may be overcome only by clear and convincing evidence. *Id. See also id.* § 2254(d) (providing that federal *habeas* relief shall not be granted with respect to any claim adjudicated on the merits in state court proceedings unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

As a result of these legislative developments, it is increasingly difficult to find volunteer counsel willing to assume responsibility for a post-conviction death penalty case. For volunteer counsel, the investment of time -- which amounts to hundreds, if not thousands, of hours -- now must often be compressed into a very short time period, and there is far less support available from experienced death penalty resource centers. As a result, there currently are many death row inmates in several States who have *no* lawyer to assist them in connection with their initial state *habeas* claims. For example:

- In Georgia, the loss of federal funding for the Georgia Resource Center in 1996, and the enactment at the same time of a new state rule expediting post-conviction proceedings in capital cases, *see* Ga. Super. Ct. Rule 44 (effective Jan. 11, 1996), have had a dire impact on the

availability of counsel to assist death row inmates. This is demonstrated most dramatically by the instant case, where Exzavious Gibson was forced to stand alone at his post-conviction hearing, offering little more than "I don't know what to plead." *Gibson v. Turpin*, No. 95-V-648, Transcript of Hearing, 2-3 (Sept. 12, 1996, Superior Court of Butts County, Georgia). By the end of the year, there will be no fewer than eight death row inmates who have completed direct review and will be without counsel for state post-conviction proceedings.

- In Alabama, there are approximately 186 prisoners sentenced to death. While the elimination of the state resource center has made it impossible to track precisely the number of death row inmates currently without lawyers, it is fair to say that there are at least 30 individuals who are, or within the next six months will be, in jeopardy of running the federal statute of limitations without counsel to file state post-conviction petitions. State resources for indigent capital representation are virtually non-existent, and appointment of counsel is wholly discretionary. *See* Ala. Code § 15-12-23. In addition, in those cases where counsel is appointed, fees are capped at $1000. *Id.*

- In Pennsylvania, an extreme shortage of resources has made it impossible to track the number of death row inmates without lawyers. About half of Pennsylvania's 200 death row inmates lacked counsel even *before* the state resource center lost its federal funding in 1996. The crisis has only deepened since then. In 1997, the Pennsylvania legislature defeated a measure to provide state funding for post-conviction representation of indigent death row inmates. The capital resource center briefly managed to subsist on private funding, but on June 15, 1999, it permanently closed its doors due to lack of funds.

In sum, the constitutional question raised by Exzavious Gibson has broad impact beyond this case.

II. There Is a Substantial Constitutional Basis for Recognition of a Right to Counsel for the Pursuit of Initial State *Habeas* Claims in Death Penalty Cases.

It is the position of the American Bar Association that the contemporary standards of decency encompassed within the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. 86, 101 (1958), dictate that no person should face the executioner alone: attendant to the State's power to impose the ultimate punishment of death is the obligation to ensure that counsel is available for the condemned at all proceedings where the inmate's substantial rights are determined, however those proceedings may be defined by state and federal law. *See Resolution of the ABA House of Delegates* 102B (1979) (urging adoption of a rule "providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions, if necessary, in death penalty cases where the defendant cannot afford to hire counsel"). Indeed, certain constitutional rights of the condemned are not implicated, and therefore remain at issue, until the time of execution. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (Eighth Amendment forbids execution of one who is mentally incompetent at the time of execution). At least 80 people sentenced to death since the reinstatement of capital punishment have been exonerated, many of them long after their direct appeals were complete.

This case, however, involves a much narrower right. The issue here is whether an indigent death row inmate may be executed where critical constitutional claims that go directly to the reliability of the underlying conviction and death sentence

have never been heard with the assistance of counsel. The ABA submits there is a substantial constitutional basis for a limited exception to the rule of *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which held there is no general right to counsel in post-conviction proceedings.

A. Recognition of a right to counsel for an indigent party generally is dependent on the nature of the underlying interest and the importance of counsel to a fair determination of the proceedings.

"Courts have confronted, in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)). Although the Constitution may not guarantee a particular form of state review, "once a State affords that right, *Griffin* held, the State may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 110 (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in the judgment)).

In certain circumstances, the right of meaningful access to the courts guaranteed by the Equal Protection Clause encompasses a right to the assistance of counsel. In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that an indigent criminal defendant may not be denied the assistance of counsel in connection with his first appeal as of right, on the ground that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Id.* at 355 (quoting *Griffin*, 351 U.S. at 19). The Court emphasized the difference between prosecuting a criminal appeal with the benefit of counsel, and doing so without:

> [T]he rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent . . . is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Douglas, 372 U.S. at 357-58. The Court noted that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* at 357. But the Court emphasized that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* (emphasis in original).

Since *Douglas* this Court has continued to view the "initial appeal as of right" as distinct in terms of the State's obligation to provide counsel to ensure meaningful access. *See Ross v. Moffitt*, 417 U.S. 600, 615 (1967) (no right to state-provided counsel on discretionary review to state supreme court); *Finley*, 481 U.S. at 556 (no right to state-provided counsel on state collateral review). Both *Ross* and *Finley* emphasized that the defendants in those cases already had been assisted by counsel in pursuing the *same* claims during a previous appeal, and thus were likely to have access to a transcript from their trial, an appellate brief on their behalf, and an opinion disposing of their case. *See Ross*, 417 U.S. at 614-15; *Finley*, 481 U.S. at 557.

More recently, in *Coleman*, the Court again addressed an inmate's right to counsel in state *habeas* proceedings. It found no right to counsel to pursue an appeal of an adverse ruling of the state *habeas* trial court, even though the claims at issue were first-time *habeas* claims that could not have been brought on direct appeal. *Coleman*, 501 U.S. at 752. The Court rested

that ruling, however, on the ground that the decision of the state *habeas* trial court was itself the equivalent of an "appeal" of the underlying criminal conviction, and the petitioner had been afforded the assistance of counsel in connection with that "appeal." As explained by the Court: "Coleman has had his 'one and only appeal,' if that is what a state collateral proceeding may be considered. . . . What Coleman requires here is a right to counsel on appeal from *that* determination. Our case law will not support it." *Id.* at 756 (emphasis in original).

Crucial to the *Coleman* decision, therefore, was that counsel had been provided in the state *habeas* trial court. Exzavious Gibson had *no* counsel at that stage. Thus, the Court in *Coleman* expressly did not decide the question presented here, *i.e.*, whether "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. Where, as here, those initial state *habeas* claims could not have been brought on direct review, and therefore the initial state *habeas* hearing *is* the equivalent of the inmate's "one and only appeal," the decisions from *Douglas* through *Coleman* compel the conclusion that counsel must be afforded to an indigent death row inmate.

This Court's due process jurisprudence also supports recognition of a right to counsel in the first state *habeas* proceeding in a capital case. For example, in *In re Gault*, 387 U.S. 1, 41 (1967), the Court held that the Due Process Clause requires appointment of counsel for a child in a juvenile delinquency proceeding that may result in confinement, despite "the 'civil' label-of-convenience which has been attached to juvenile proceedings." *Id.* at 50. The Court again relied upon the critical importance of counsel in this setting: "The juvenile

needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36. In other settings involving important underlying interests, the Court has recognized a conditional right to counsel dependent upon the nature and complexity of the particular case. *See, e.g., M.L.B.*, 519 U.S. at 117 (characterizing *Lassister,* 452 U.S. at 31-32, as recognizing a due process right to counsel in parental termination cases "when warranted by the character and difficulty of the case"); *Gagnon*, 411 U.S. at 790 (recognizing a due process right to counsel in probation and parole revocation hearings when dictated by "fundamental fairness").

As this Court has recognized, cases involving rights of access to judicial processes "'cannot be resolved by resort to easy slogans or pigeonhole analysis,'" *M.L.B.*, 519 U.S. at 120 (quoting *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)), but two factors pervade the analysis. First, is an assessment of the importance of the underlying interest. *See, e.g., In re Gault*, 387 U.S. at 36 (child may be "subjected to the loss of his liberty for years"); *Lassiter*, 452 U.S. at 27 ("[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one"). Second, the Court has considered the extent to which counsel is necessary to protect the rights of the indigent party. *Compare Douglas*, 372 U.S. at 358 (without counsel, first appeal is "a meaningless ritual"), *with Gagnon*, 411 U.S. at 787-88 (recognizing a right to counsel in some, but not all, probation and parole revocation proceedings because in many cases the alleged violation is already established and there is less need for counsel). Employing that framework, the Court should recognize a right to counsel in the limited context at issue here.

B. The nature of the underlying interest and the importance of counsel in the setting presented here provides a compelling basis for an exception to the *Finley* rule in capital cases.

This case presents a particularly compelling basis for recognition of an indigent party's right to counsel: there are few interests more substantial than the fair administration of the death penalty, and few instances in which the assistance of a lawyer is more indispensable than the pursuit of post-conviction claims, including ineffective assistance of counsel claims, that could not have been raised on direct appeal.

This Court long has recognized that "death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *see also Lankford v. Idaho*, 500 U.S. 110, 125 (1991) (same). This fundamental difference creates a greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Imposition of the death penalty also "places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." *Giarratano*, 492 U.S. at 8 (plurality opinion). Perhaps most notably, although there generally is no constitutional right to appeal a criminal conviction, "meaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty," *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976) (plurality opinion), and is an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion). Thus, the interest in

ensuring the validity of a death row inmate's conviction and sentence is of the highest magnitude.

In addition, the claims sought to be raised in these initial state *habeas* proceedings cannot be brought successfully without a lawyer, both because of the nature of the underlying claims and because of the complexities of post-conviction and death penalty law. First, with respect to the underlying ineffective assistance of counsel claims that are often at issue, this Court has recognized that a "layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance." *Kimmelman*, 477 U.S. at 378. Second, the complexities of *habeas corpus* and death penalty law also create a special need for the guiding hand of counsel. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.").

In sum, it is hard to imagine a proceeding for which counsel is more necessary. It is noteworthy that Congress has recognized these principles in creating a statutory right to counsel in federal *habeas* proceedings in death penalty cases. *See* 21 U.S.C. § 848(q)(7) (expressly noting "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation"); *see also Jackson v. Mississippi*, 732 So. 2d 187, 188 (Miss. 1999) (holding that "the nature of death penalty litigation in the courts of this State, coupled with the ultimate penalty the State seeks to impose," requires recognition of a constitutional right to counsel in capital post-conviction proceedings).

Recognition of a right to counsel in this setting would not necessarily dictate the manner in which counsel is provided.

This Court frequently has emphasized that States must be afforded flexibility in ensuring that indigent litigants are afforded meaningful access to the courts. *See, e.g., M.L.B.*, 519 U.S. at 112 n.5 (right to meaningful access does not impose an inflexible requirement that a State provide a full trial transcript); *Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring) (States have "considerable discretion in assuring ... meaningful access to the judicial process"); *id.* at 14 (Kennedy, J., concurring in the judgment) ("The requirement of meaningful access can be satisfied in various ways . . . ."). States may be able to satisfy their obligation to ensure death row inmates access to the courts by funding resource centers and public defender organizations to work with the private bar to provide representation to indigent death row inmates. But, as this case illustrates, it cannot be constitutional for the State to do *nothing*, leaving an indigent death row inmate like Exzavious Gibson totally alone to prosecute his "one and only appeal" of first-time *habeas* claims. If that result is constitutionally permissible, it too readily may become the norm for *all* capital cases, even in States that presently provide some level of support.

For these reasons, the ABA submits that an indigent death row inmate must be afforded counsel to pursue his initial state post-conviction claims. The ABA urges the Court to grant the petition and consider this important constitutional question, which is critical to the integrity of our capital punishment system. Nothing will be served by allowing an increasing number of these cases to flounder through the state courts without counsel, creating new problems for federal *habeas* and potentially prolonging the ultimate resolution of these cases before the issue finally is resolved by this Court.

CONCLUSION

The ABA respectfully urges the Court to grant the petition.

Respectfully submitted,

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